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IN THE SUPREME COURT OF THE UNITED STATES

LESLIE C. CASE, Plaintiff-Appellant-Petitioner,

v.

BASF WYANDOTTE CORP. (A corporation of Michigan), and NATIONAL GYPSUM COMPANY (A corporation of Delaware),

Co-Defendant-Appellee-Respondents.

PETITION FOR WRIT OF CERTIORARI

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September 14, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Do not the Constitution, and the prior decisions of this Court, mandate that a patentee engaged in a patent infringement suit receive a fair trial and a decision in accordance with the merits, and with precedent?

2. Do not the Constitution, and the prior decisions of this Court, require that notice of the district court's decision in a patent suit be given to the patentee, especially where the trial was not conducted in accordance with the due process requirement?

3. Is it not a misconstruction of Rule 77(d), F. R. Civ. P., that it should serve as a vehicle to prevent an appeal as a matter of right of a district court decision rendered contrary to rule and precedent?

4. How disorderly must judicial conduct in the lower courts become, before this Court exercises its supervisory powers?

5. Will this Court act to return the patent system to its constitutional basis and legislative intent?

TABLE OF CONTENTS

	Page
References to Reports Below	1
Statement of Grounds for Jurisdiction	2
Constitutional Provisions, Statutes, Etc. Involved Here	3
Statement of the Case	4
The Parties	4
The Action	5
The Proceedings in the District Court	6
The Orders Complained Of	10
Arguments Relied Upon for Allowance	12
I. A Patentee is Constitutionally Entitled to a Fair Trial	12
II. A Patentee is Constitutionally Entitled to a Notice of Decision	25
III. This Court must Exercise Judicial Supervision	31
IV. This Court must Rescue the Patent System	38

CITATIONS OF AUTHORITY

Decisions of This Court	Page
Board of Regents v. Roth, 408 U.S. 564 (1972)	25,28
Burns v. U.S. 287 U.S. 216(1932)	19,35
Burton v. U. S. 196 U.S. 283(1905)	2,17
Dows v. Nat. Exch. Bank 91 U.S. 618 (1875)	14,25
Grant v. Raymond 6 Peters 218(1832)	38
Graver Tank v. Linde Air Prod. 339 U.S. 605,(1950)	23
Hammond Packing v. Arkansas 212 U.S. 322 (1908)	14
Hartford-Empire Co. v. U.S. 323 U.S. 386 (1944)	12,25
Heike v. U.S. 217 U.S. 423 (1910)	2
Hickman v. Taylor 329 U.S. 495(1947)	17
Hill v. Hawes 320 U.S. 520 (1944)	29,30
Kerotest v. C-O-Two Fire Extinguisher 342 U.S. 180 (1952)	36
Kerr v. U.S. Dist. Ct. 426 U.S. 406	18,19
Klapprott v. U.S. 335 U.S. 601(1948)	17,35
La Buy v. Howes Leather Co. 352 U.S. 249 (1957)	34
Langnes v. Green 282 U.S. 531 (1930)	18,36

M'Ferran v. Taylor and Massie
3 Cranch 270 22

McNabb v. U.S. 318 U.S. 332(1943) 37

Miranda v. Arizona 384 U.S. 436
(1966) 26,27,28

Ohio Bell Tel. Co. v. Pub. Util.
Comm. 301 U.S. 292 (1936) 14,17

Precision Instrument v. Automotive
Maintenance Machy.Co. 324 U.S.
806 (1944) 42

Roche v. Evaporated Milk Assoc.
319 U.S. 21 (1943) 37

The Steamship Styria v. Morgan
186 U.S. 1 (1901) 36

Union Paper-Bag Machine Co. v. Murphy
97 U.S. 120 (1877) 23

U.S. v.United Shoe Machy. Co.
247 U.S. 32 (1917) 13,38

Will V. U.S. 389 U.S. 90(1967) 34

Zenith Radio Corp. v. Hazeltine
Research 395 U.S. 100 (1969) 13,38

Constitutional Provisions

Article I, Section 8	Pages 3,12,38
Amendment V	Pages 3,13,30

Statutes

28 USC 1254	Page 2
35 USC 154	Page 3
35 USC 281	Page 3

Federal Rules of Civil Procedure

Rule 60(b)	Pages 3,10,11,32,33
Rule 77(d)	Pages 3,27,28,29

REFERENCES TO REPORTS BELOW

At the time of submission of this petition, the petitioner is aware of only the report regarding the decision regarding venue. That decision and report are not in controversy, and therefore of no note here.

Petitioner is not aware that the orders of either the district court or the court of appeals has been published.

STATEMENT OF GROUNDS FOR JURISDICTION

(i) The order of the Court of Appeals, Federal Circuit, was dated On July 3,1984.

(iv) This Court has jurisdiction to review the order in question under 28 USC 1254(1).

This Court also has jurisdiction to issue a writ of error under the court of appeals act:

> "and (otherwise unappealable) cases in which is involved a deprivation of constitutional rights may be brought to this court by writ of error under Par. 5 of the court of appeals act"
> Heike v. U.S. 217 U.S. 423,428 (1910)

> "in such case (of constitutional question) the statute grants to this court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question."
> Burton v. U.S. 196 U.S. 283,295 (1905)

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. Article I, Section 8 of the United States Constitution (Commerce Clause)

2. Amendment 5 to the United States Constitution.

3. 35 United States Code, 154(Contents and Term of Patent)

4. 35 United States Code, 281 (Remedies for Patent Infringement)

5. Rule 60(b), Fed. Rules Civ. Proc. (Mistake, inadvertence, etc.)

6. Rule 77(d), Fed. Rules Civ. Proc. (Notice of Orders or Judgments)

(Texts given in the Appendix, starting on page A 35)

STATEMENT OF THE CASE

The Parties

The Petitioner is a private inventor, residing at Winchester, Massachusetts. The Petitioner is co-inventor and owner of U. S. Patents Nos. 3,483,169 and 3,502,601, both in suit. Petitioner is co-owner and president of Eltron, Inc., a corporation of New Hampshire, with an office in Nashua, New Hampshire. Eltron is engaged in research and development of new polymer products.

Respondent BASF Wyandotte is a corporation of Michigan, with main offices in Parsippany, New Jersey. Respondent is a wholly owned and controlled subsidiary of Badische Aniline and Soda Fabriken, a corporation of the Federal Republic of Germany. Respondent is a supplier of raw materials to the polyurethane industry, and its products include raw materials for polyurethane foams.

Co-Respondent National Gypsum Company is a corporation of Delaware, with offices in Buffalo, New York. Co-Respondent is a manufacturer of building products, including insulation, such as urethane foam insulation and composites thereof.

The Action

The action in the district court, CA 75-5033-T, D. Mass., was an action for patent infringement (with exclusive jurisdiction residing in the federal courts under 28 USC 1338(a)), and for damages caused by antitrust violations (with jurisdiction residing in the federal courts under 28 USC 1337). The basis of the action was the allegations that Respondent BASF Wyandotte produced and sold various products which infringed the claims of the '169 patent in suit, and that the purchase and use of these products by Co-Respondent National Gypsum infringed the '601 patent

in suit. It was also alleged and shown that the sales of the accused products by Respondent BASF Wyandotte to Co-Respondent National Gypsum were made under especially favored conditions and circumstances, in violation of the anti-trust laws, including the Robinson-Patman Act. It was alleged that the favorable terms of sale between Respondents were the reason that Co-Respondent National Gypsum purchased the accused products, rather than the admittedly more satisfactory products offered for sale to Co-Respondent by Petitioner's company.

The Proceedings in the District Court

The action in the district court began with a failure of Respondent BASF Wyandotte to answer the complaint. Petitioner obtained a default against Respondent. Respondent then moved for setting aside the default, and the motion was granted

by the district court, despite Petitioner's showing that the affidavit in support thereof contained statements contrary to known facts.

Respondent then filed repeated motions for dismissal, asserting lack of personal jurisdiction and venue. These motions were denied.

For the first few years, the action was at a standstill. All discovery attempted by Petitioner was objected to by Respondent BASF Wyandotte, and assistance to enforce discovery was uniformly withheld by the various magistrates to whom the attempts were referred. Finally, in 1979, Petitioner filed a series of motions for summary judgment. All were denied, without explanation, and the district court took no action on Petitioner's complaint that the law firm of (local) counsel for Respondents had previously counseled Petitioner on the prosecution of the

patents in suit.

Even after the motions for summary judgment, Petitioner had extreme difficulty in obtaining discovery. Along the way, a petition to the Court of Appeals seeking expedition of the adjudicatory process, and more than one request or motion for action by the court, were filed.

Numerous items of discovery which were sought by Petitioner were never produced, nor required to be produced. A set of seven allegedly privileged documents of Respondent which evaluate the patents in suit were never inspected by the court in camera. The records of sales calls made by Respondent's salesmen, although ordered to be produced, were not. The original drafts of affidavits (those actually prepared by the witness) filed in the name of Respondent's "expert" witness were never produced for Petitioner's inspection.

What discovery was had, was under the supervision of a magistrate, and was conducted under an "expedited" schedule, which allowed for no follow-up to information gained in the discovery. Petitioner's attempts to complete discovery were met with overt hostility on the part of the magistrate, who haranged Petitioner and threatened a finding of contempt.

The trial in the action was held in reasonably straightforward fashion, with two notable exceptions:
(1) The court requested, and held, ex parte conferences with the parties "to assist in settling the action", and
(2) The court repeatedly foreshortened cross-examination of Respondent's "expert" witness.

Subsequent to trial, there was controversy, unresolved to date, regarding the timeliness, mode of delivery, and contents of Respondent's post-trial submissions to

the court.

The decision of the district court, adverse to Petitioner, was dated, and may have been entered, on August 31, 1983. Petitioner did not receive notification of that decision, and learned of said decision for the first time on inspecting the docket on November 23, 1983. A motion under Rule 60(b), requesting the vacating and reentering of the judgment, was filed two days later. In support of that motion, various instances of mishandling of the docket by the clerks were documented, elaborating the context in which notice of judgment was not received.

The Orders Complained Of

On January 3, 1984, the district court denied Petitioner's Motion under Rule 60(b), without a hearing or explanation.

Petitioner then filed an appeal on the merits, and a petition under the All Writs

Act, with the Court of Appeals for the Federal Circuit. The appeal addressed the merits of the decision of the district court, with emphasis on the failure to deal with anything other than an attempted literal reading of the claims, and with failure to comply with precedent. The petition demonstrated the manifold circumstances which make the failure to receive notice of the court's decision everything but a simple failure to receive notice, and to check on the docket.

The Court of Appeals declined to address the merits of the district court decision, and on July 3, 1984, dismissed the appeal, finding "no abuse of discretion" by the district court in denying Petitioner's Motion under Rule 60(b).

ARGUMENTS RELIED UPON FOR ALLOWANCE OF WRIT

I. A Patentee is Constitutionally Entitled to a Fair Infringement Trial Based on the Merits, and a Decision in Accordance with the Facts and Precedent.

1. A patent is property.

> "That a patent is property, protected against appropriation both by individuals and by government, has long been settled"
> Hartford-Empire Co. v. U.S. 323 U.S. 386, 415 (1944)

2. The property rights owned by the patentee are statutory, require resort to an action in the federal courts, and commits the Government to assist in the enforcement of the patent rights.

> "The Congress shall have power . . . To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."
> U.S. Constitution, Article I, Section 8 (Commerce Clause)

"Every patent shall contain a short title of the invention and a grant to the patentee . . . of the right to exclude others from making, using, or selling the invention throughout the United States . . ." 35 USC 154

"A patentee shall have remedy by civil action for infringement of his patent" 35 USC 281

"The heart of his (the patentee's) legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent." Zenith Radio Corp. v. Hazeltine Research 395 U.S. 100, 135 (1969)

"the inventor . . . gets the right to an exclusive use. Take this from him and you take all that the law gives him and to secure which the public faith is pledged." United States v. United Shoe Machy.Co. 247 U.S. 32, 58 (1917)

3. The property rights in the patent are Constitutionally guaranteed by the Fifth Amendment.

"No person shall . . . be deprived of life, liberty, or property, without due process of law;" U. S. Constitution, Amendment V

"The owner of personal property cannot be divested of his ownership without his consent, except by (due) process of law" Dows v. Nat. Exch. Bank of Milwaukee 91 U.S. 618,637(1875)

"The standpoint of due process (is) the protection of the individual against arbitrary action" Mr. Justice Cardozo, in Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio 301 U.S. 292, 302 (1936)

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known" Ohio Bell, supra, at 304

"The fundamental guarantee of due process is absolute and not merely relative" Hammond Packing v. Arkansas 212 U.S. 322, 350 (1908)

4. The Petitioner Patentee did not receive a fair trial on the merits, and a decision in accordance with the facts and precedent.

a) Petitioner obtained a court order requiring Respondent BASF Wyandotte to produce various business records. That order clearly read to include reports filed by Respondent's salesmen in calling on Co-Respondent National Gypsum Company. The original records were not produced,

but a small number of copies thereof, located in the research department files were produced. Petitioner sought to have the court order enforced. Respondent's position, as set forth in a sworn affidavit, was that Respondent did not keep such records, representative specimens of repeatedly revised versions of which had been produced, and which specimens referred to a file in which they were kept. The district court refused to enforce the court order for production.

Indeed, in searching through the files which were produced, clear evidence was found that they were incomplete, and probably had been "sanitized". The matter was brought to the attention of the district court, which took no notice or action.

Still further, when Petitioner sought enforcement of the court order for production, the presiding magistrate haranged Petitioner, and threatened him

with a contempt citation. A copy of the tape of that hearing was sought by Petitioner, and it was refused.

Even on these facts, it seems impossible to conceive that the district court intended to conduct a trial based on all of the available facts. The sales call reports of Respondent's salesmen calling on Co-Respondent undoubtedly would elucidate the unique pricing and availability of the products sold between Respondents (see below) and almost certainly would refer to Petitioner's patented products concurrently being evaluated by Co-Respondent National Gypsum Company. Thus, the sales call reports are manifestly relevant and material, even essential, to a trial on the merits of the combined infringement and antitrust action.

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."
Hickman v. Taylor 329 U.S. 495, 507 (1947)

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." Ohio Bell, ibid

"in such case (of constitutional question) the statute grants to this Court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question. Horner v. United States, 143 U.S. 570 . . ."
Burton v. U.S. 196 U.S. 283 (1905)

"Petitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with the elemental concepts of justice." Klapprott v. U.S. 335 U.S. 601, 615 (1948)

b) Respondent BASF Wyandotte produced a listing of seven allegedly privileged documents which admittedly evaluate Petitioner's patents in suit. All, or nearly all, of the documents cannot meet the established test of privilege. Specifically, none seems to be a confidential

communication seeking or giving legal advice). Those seven documents were never produced for an in camera inspection by the court, despite Petitioner's repeated urging.

Kerr v. U. S. District Court, 426 U.S. at 406 stands for the proposition that an in camera review of allegedly privileged documents is to be granted, on proper application. The documents in instant question could hardly be more relevant and material, being an evaluation of the patents in suit by the adverse party.

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1,9. . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green 282 U.S. 531, 541 (1930)

> "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1,9 . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result' Langnes v. Green 282 U.S. 531, 541"
> Burns v. U.S. 287 U.S. 216,222-3 (1932)

Does not Kerr v. U.S. Dist. Ct., supra, establish that an in camera inspection must take place, by law? How could any conscientious judgment by the district court not involve an in camera inspection? How could there not have been abuse of discretion? How could the order of the court of appeals been other than a pro forma attempt to avoid that court's responsibility?

c. The district court judge, at trial, repeatedly foreshortened cross-examination of the "expert" for Respondent BASF Wyandotte. Each time that witness

admitted on cross-examination that he had previously erred, or made a false statement under oath, the court further foreshortened the cross-examination. In addition, testimony by that witness on deposition revealed that the affidavits filed in the action by that witness were not his original versions thereof, but revisions prepared by counsel. Petitioner's requests for access to the witness's own drafts were objected to by Respondent, and denied by the district court.

Again, the district court acted in such a fashion as to deny Petitioner the facts on which a proper trial on the merits could be held. This was not manifest abuse of discretion?

d) Counsel for Respondents is a member of a firm which had previously counselled Petitioner on the patents in suit. The district court absolutely and totally ignored this very obvious conflict of

interest, when it was pointed out by Petitioner. Manifestly, the district court sees no necessity of conducting a trial with even the appearance of impartiality. This is not gross abuse of discretion? And just what is the function of the Court of Appeals?

e) The decision of the district court ignored data produced by Respondent BASF Wyandotte that (i) essentially all sales of its accused products are at different prices from every other sale of the same products, (ii) that the sales between Co-Respondents were at an especially favorable price, and under unique conditions, (iii) that such particularly favorable sales terms were necessitated by problems with the accused products sold between Co-Respondents, and the superior properties of Petitioner's product sold to Co-Respondent National Gypsum Company, and (iv) that Co-Respondents engaged in

reciprocal purchases of the accused products.

The decision of the district court stated that the case for antitrust violations "had not been proven," thus simply ignoring the facts.

> "it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded"
> M'Ferran v. Taylor and Massie
> 3 Cranch 270, 280

f) The decision of the district court totally ignored the prosecutions of Respondent's U.S. Patents which repatented Petitioner's patents in suit. Respondent's prosecutions clearly demonstrated the novelty, utility, and importance of the patents in suit, and that Respondent BASF Wyandotte was commercially practicing the inventions in issue.

g) The decision of the district court failed to rule on the issue of patent validity, and in ruling on infringement, dealt only with an attempted literal

interpretation of the claims, and ignored the art and the advances made thereover by the patents in suit.

> "in determinining the question of infringement, the Court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result.
> "it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained."
> Union Paper-Bag Machine Co. v. Murphy 97 U.S. 120, 125 (1877)

> "What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum." Graver Tank v. Linde Air Prod. 339 U.S. at 609

Manifestly, the Petitioner did not receive a fair trial. The district court acted to exclude much very relevant and material evidence, and ignored much of that evidence which was before the court.

The conduct of the litigation by the district court, and that court's decision, could hardly be more antithetical to the guidelines established by this Court. This Court's pronouncements regarding the necessity for a fair trial, and the proper conduct of such a trial, read very well on paper, but seem to have no correlation with what actually goes on in a patent trial. Thus, just what is the function of this Court's decisions?

II. Because a patent is property, the rights to which are constitutionally protected, a patentee is constitutionally entitled to notice of an adverse decision in a patent infringement trial.

1. As shown above, there is no doubt that a patent is property, constitutionally protected by the Fifth Amendment. Hartford-Empire Co., supra, Dows v. Nat. Exch. Bank, supra.

2. The protection afforded by the Fifth Amendment extends beyond mere ownership of the patent, but also to a fair trial on the merits of infringement, and to an appeal of right as well (most particularly where due process was not afforded at trial).

> "The Court has also made it clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Board of Regents v. Roth 408 U.S. 564, 571-2 (1972)

"These precious (Fifth-Amendment) rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it' Cohens v. Virginia, 6 Wheat 264 . . ." Miranda v. Arizona 384 U.S. 436,442 (1966)

"It was necessary . . . to insure that what was proclaimed in the Constitution had not become but a 'form of words' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 . ." Miranda,at 444

"Our concern for adequate safeguards to protect precious Fifth Amendment rights is, or course, not lessened in the slightest." Miranda, at 457

"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They know that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635 . . . The privilege was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard' Counselman v. Hitchcock 142 U.S. 547, 562 . . . We cannot depart from this noble heritage" Miranda, at 459-60

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."
> Miranda, at 468

Petitioner did not receive notice of the decision of the district court, and there is no affirmative statement on record that the notice was actually sent, as required by Rule 77(d), F. R. Civ. P. Indeed, there is an affidavit on file (entered by Respondents) that counsel "checked the docket" shortly after the Respondents received mailed notice of the district court's decision. That act of checking would have meaning only if a question arose (as it did) with respect to entry of judgment. And that act of checking thus not only implies that notice was not sent to Petitioner, but further that Respondents were aware that notice

had not been sent.

It immediately follows, especially in view of Miranda, supra, at 468, that Petitioner is constitutionally entitled to receive notice of the district court's decision and judgment, so as to make "an intelligent decision as to (the) exercise" of an appeal on the merits, so as to assert the constitutionally guarantee of due process, denied at the trial.

3. Rule 77(d) is constitutionally precluded from operating to deny an appeal on the merits of a decision not rendered in accordance with the due process requirement.

Board of Regents, supra, holds that the Fifth Amendment rights extend well beyond the actual ownership question. And Miranda, supra, at 468, explicitly holds that the Fifth-Amendment rights extend to receipt of notice of legal action. Manifestly,

when constitutionally protected rights are involved, the last sentence of Rule 77(d) --"Lack of notice . .. by the clerk does not affect the time to appeal . . ."-- directly contravenes decisions of this Court which construe the Constitution, and thus Rule 77(d) is UNCONSTITUTIONAL on these facts. Notice must be given, to accord due process of law.

A prior decision of this Court, Hill v. Hawes, 320 U.S. 520, 523-4(1944), held that where notice of the district court's decision has not been given, an appeal on the merits must be allowed on facts far less compelling than here. Rule 77(d) was then amended so as to circumscribe (and negate) the Hill decision. But Hill was based on general principles of fairness, and reached no Fifth Amendment constitutional question. It is now clear, than when constitutional rights are involved, the amendment to the Rule 77(d) overreached

itself, and breached the most important constitutional rights of the Fifth Amendment. Hill stands as sound law, when placed on a constituional footing.

III. The Facts Call for Intervention by This Court, to Exercise its Function of Judicial Supervision.

Recounting only the most salient points:
(1) The district court denied access to the relevant discovery required for a proper trial on the merits,
(2) The district court conducted a trial not in accord with established standards,
(3) The district court rendered a decision not in accord with the facts or precedents set by this Court,
(4) The district court held ex parte contacts with the parties, and received a large "sealed" post-trial submission from Respondents, the contents of which are still undetermined, and access to which was denied to Petitioner,
(5) Petitioner did not receive notice of the district court's decision, although respondents did, and indeed, it appears

that Respondents were aware that notice was not sent to Petitioner.

(6) Petitioner's Motion under Rule 60(b) was denied by the district court, without explanation, and without hearing.

(7) It was demonstrated that the clerks of the district court did not handle the docket in accordance with the rules, during the time period in which the Motion under Rule 60(b) was pending.

(8) The Court of Appeals found that the district court "did not abuse discretion", in denying the Motion under Rule 60(b).

There can be no doubt that the handling of the action in the district court failed in numerous respects to conform to the standards of due process, established procedures for adjudication, and even to established ethical standards. Whatever the intent behind the denial of the Motion under Rule 60(b), there can be no doubt

that the effect of the failure to send notice of the district court's decision, and the denial of the Motion under Rule 60(b) was to preclude an appeal on the merits of the conduct of the district court. And the dismissal of Petitioner's appeal very conveniently relieved the Court of Appeals from fulfilling its duty to exercise judicial supervision.

Petitioner respectfully suggests that he at least cannot think of any known fact inconsistent with the possibility that a specific ex parte agreement existed or exists with counsel for Respondents, and that the post-trial submissions of Respondent contained extraneous matter of substance.

What, therefore, constitutes "abuse of discretion"? Indeed, if not present in the instant facts, does it exist at any time and under any circumstances?

Several decisions of this Court bear on the instant facts, and each such decision strongly calls for action on the instant facts by this Court:

> "(W)here the subject concerns the enforcement of the (rules) which by law it is the duty of this Court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule involved. As was said . . . were the Court' . . . to find that the rules have been practically nullified by a district judge, . . . it would not hesitate to restrain(him) . . .'"
> La Buy v. Howes Leather Co.
> 352 U.S. 249, 256(1957)

> "We granted certiorari, . . .,because of the wide implications of the decision below for the orderly administration of . . . justice in the federal courts."
> Will v. U.S. 389 U.S. 90, 94-5

> "The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this Court is not controverted." Will, ibid, at 100

"To take advantage of this reason (Rule 60(b)) the Rule requires a litigant to ask relief 'not more than one year after the judgment, order, or proceeding was entered or taken.' It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect." . . . But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part."
Klapprott v. U.S. 335 U.S. 601,613 (1948)

"Petitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with the elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to . . . grant petitioner a fair hearing." Ibid, at 615

"The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1,9 . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result' Langnes v. Green 282 U.S. 531,541"
Burns v. U.S. 287 U.S. 216, 222-3 (1932)

"The establishment of a clearly defined rule of action would be the end of discretion" "'Discretion means the equitable decision of what is just and proper under the circumstances.' "
The Steamship Styria v. Morgan
186 U.S. 1, 9 (1901)

"The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1,9 . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."
Langnes v. Green 282 U.S. 531,541
(1930)

"If in a rare instance a district judge abuses the discretionary authority the want of which precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court." Mr. Justice Frankfurter, in Kerotest Mfg. Co. v. C-O-Two Fire Extinguisher Co. 342 U.S. 180,185
(1952)

Most particularly:

> "In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules . . . that the trial court . . . acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling . . ."
>
> Roche v. Evaporated Milk Assoc. 319 U.S. 21, 26 (1943)

A more clear set of facts showing a deliberate intent to "thwart appellate review of the ruling" could hardly be conceived. Rare though it may be that this Court exercises the function of judicial supervision, the instant facts demand that exercise:

> "Judicial supervision of the administration of . ... justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence"
>
> McNabb v. United States 318 U.S. 332, 340 (1943)

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IV. This Court Must Act to Restore the Patent System to the Constitutional Enablement and Statutory Intent, and to Fulfill the Public Trust, and to Protect the Public Interest.

The constitution, Article I, Section 8, enables the Congress to "promote science and the arts," by statutorily reserving to inventors "exclusive use" of their inventions for a limited time. The patent act manifestly attempts to accomplish this purpose. Various decisions of this Court have construed the patent act as granting statutory rights to inventor-patentees (U.S. v. United Shoe, supra; Zenith Radio Corp. v. Hazeltine, supra) and that these statutory rights are a solemn contract with inventor-patentees, to which the public faith is pledged, (Grant v. Raymond, 6 Peters 218,241-2 (1832)).

This reads well on paper, is unexceptionable in every respect, and had stood the

test of time. All of these are clearly a major force in encouraging would-be inventors to try to advance the state of the art, and to become patentees.

The instant facts demonstrate, however, that these words and pronouncements have lost their relevancy to the real world. Petitioner-patentee was denied even the appearance of a fair trial and decision on the merits, was repeatedly harassed in his attempts to obtain proper preparation for trial, and was pointedly not notified of the district court's decision, and thus denied an opportunity to appeal as a matter of right. The appeals court found there to be "no abuse of discretion" in all the doings of the district court.

The facts are that the patent act is now treated by the district courts as a playground for specialized lawyers. There is no cognizance of the constitutional and statutory basis of patent rights, and that

the public faith is pledged to assist the patentee. Instead, a patent infringement suit is a forum for unlimited games (which in the present case have now extended to nearly 9 years). Discovery rules mean nothing; precedent (including this Court's decisions) mean nothing; Fundamental precepts of due process, fair adjudication, and even ethical conduct are meaningless. And if an appeal looms, it can be avoided by the expedient of not allowing that appeal.

The effects of the degradation of the patent system are many, wide-ranging, and of greatest importance:

Because of the great expense and general futility of patent litigation, relatively few patents are ever litigated. And because of the general irrelevancy of the merits and law in whatever litigation takes place, issued patents have deteriorated in quality. There is, after all, no reward for careful preparation and prosecution of patent

applications. Fraud and other serious defects are rampant. In the instant case, for example, it was shown that Respondent BASF Wyandotte's U.S. 3,585,185 and accompanying patents are clearly invalid over Petitioner's patents in suit, and clearly fraudulent in view of their prosecution despite contemporaneous knowledge and evaluation of Petitioner's patents by Respondent. Also, the instant case shows the irrelevancy of such a serious matter as conflict of interest on the part of patent counsel. Even the factual content of patents has degraded to the point of absurdity. Petitioner recently observed a (now rare) large-scale patent trial, with six to eight lawyers on either side of the court room, and which lasted some two to three months (literally a million-dollar trial). Two of the patents involved in that trial embodied the remarkable discoveries that (1) light travels in a straight line, and (2) a

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dimensionally stable polymer remains stable when fabricated into a device.

> "The possession and assertion of patent rights are 'issues of great moment to the public' "
> "The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud and other inequitable conduct and that such monopolies are kept within their legitimate scope."
> Precision Instrument v. Automotive Maintenance Mchy. Co., 324 U.S. 806, 815-816 (1944)

These pronouncements do not control patent litigation as currently practiced, as shown.

Because of increasing awareness by innovating companies and inventors of the degeneracy of the patent system, there is a serious long-term trend toward the filing of far fewer patent applications. A quick perusal of the Patent Gazette reveals any number of large companies which were very active in patents in the 50's and 60's but which receive only a few patents each year in the 80's. Patent departments have been

decreased in size and importance, as have many research and development departments. Petitioner is aware of one local, rather large and famous,"high-technology" company which actually liquidated its research and development department some years ago.

Because of the non-workability of the patent system as constitutionally enabled "to reserve to the inventor exclusive rights to his invention", a shift has occurred in the patents which do issue, to become merely "defensive" in nature. The objective, a peculiar perversion of the patent process, is to patent your own invention, not so as keep infringers out, but to preserve your right to work your own invention. There is, in fact, a new law now in the works in Congress which attempts to facilitate and formalize the obtaining of merely "defensive" patents.

Another shift in strategy, more significant in import, is the switch away

from attempted (and unworkable) patent protection into the trade-secret route. One manifestation of this shift is the plethora of trade-secret litigation now noted in the "Silicon-Valley" computer-component industry. Any inventor with his wits intact currently is thinking along the lines of "what can be kept secret?" rather than "what can be carefully delineated and thus patented?" This leads to an entirely different type of innovation, and frequently one of a lower order of importance. (Obsession with secrecy automatically proscribes most new products). The chemical industry, once one of our premier "high-technology" industries, has been particularly hard hit. Back in the 30's, 40's, and 50's, when a patent was a patent, it was possible to invent a new chemical or polymer with important new properties and uses, to obtain a "composition-of-matter" patent (the strongest kind possible), and to have a

17-year monopoly on a new industry. Giant companies became that way by this route. Now, because of the infirmaties of the patent system, even a "composition-of-matter" patent is just an invitation to copiers, and an entry into expensive and pointless litigation. So that type of chemical innovation is no longer with us. The chemical giants have turned either to extremely large-scale production of established products (the "commodity" approach), converted themselves into oil companies (the "energy" approach), or become purveyors of small-scale, highly developed and diversified products ("specialties") or of "services". The industry has declined, as their profits and stock prices demonstrate, and the transformation of the patent system has played a material part therein. The closely-related pharmaceutical industry has also suffered a great decrease in the rate of introduction of new products. But there

can be no substitute for new drugs with which to attack public health problems. A consequence is that new pharmaceuticals in this country tend to be of foreign origin (such as the several important new drugs introduced from Japan in the last few years).

Even the national interest has been adversely affected by the decline of the patent system. As the American inventors have cut back their attempts at innovation, the number of domestic patent filings have fallen behind its potential. Foreign companies, less aware of and less affected by the failings of the U.S. patent system, have increased their share of U.S. patent filings. The foreign share of issued U.S. patents is now roughly about 50%, and increasing. Leadership and control of U.S. high technology is demonstrably passing into foreign hands.

Not only is high technology losing ground. Heavy ("smokestack") industry is

suffering even more strongly. The domestic steel industry is crippled, and at a serious disadvantage to the much more technically advanced Japanese and Korean steel industries. The U.S. auto industry, albeit a giant, is struggling to catch up with the technical advances of the Japanese auto industry.

Even national security is in jeopardy. It is indisputable that our armed forces depend on high technology for their effectiveness. As American innovation and technology lag behind, so does the national security. Is it possible to have first-rate national security, on a base of second-rate industry, and third-rate innovation? Or, for example, will U.S. missles soon be directed by computers using Japanese components?

C O N C L U S I O N

This Court must act. One decision cannot correct and compensate for decades of degeneration in the patent system. But one decision can begin a trend toward bringing patent litigation back into compliance with the Constitutional enablement, Congressional intent, and this Court's decisions. This Court clearly should grant this petition, so as to reach not only the constitutional questions presented herein, but also so as to provide guidance badly needed by the district courts and the CAFC, and required by the public interest.

APPENDIX CONTENTS

Order of the District Court	A-1
Order of the Court of Appeals	A-2
Petition for Extraordinary Writ and Appeal (to Court of Appeals)	A-9
Constitutional Provisions Involved	A-35
Statutes Involved	A-36
Rules of Civil Procedure Involved	A-37

(ORDER DENYING MOTION UNDER RULE 60(b))

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

LESLIE C. CASE, Plaintiff	)	
v.	)	Civil Action No. 75-5033-T
BASF WYANDOTTE, et al., Defendants.	)	

MOTION UNDER RULE 60(b)

Plaintiff moves this Hon. Court, under Rule 60(b), F. R. Civ. R, for an order vacating and reentering this Court's judgment, so as to facilitate the appeal on this action.

The facts of the matter are, as shown in the accompanying affidavit:

(1) The Plaintiff failed to receive notice of judgment, either because of a failure to be properly sent, or of the mails

. . . .

Denied

J. Tauro D. J.

1/3/84

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LESLIE C. CASE, Appellant, v. BASF WYANDOTTE AND NATIONAL GYPSUM CO., ET AL., Appellees.	)))Appeal No.) 84-753))

Before FRIEDMAN, KASHIWA, and MILLER,
Circuit Judges.

ORDER

PER CURIAM.

This is an appeal from a judgment of the United States District Court for the District of Massachusetts, dismissing a suit in which the appellant alleged that appellees had infringed two of his patents and had violated the antitrust laws. After trial, the district court held that the appelant had not shown either infringement or vi lation of the antitrust laws. The appellees have moved to dismiss the appeal as not timely filed. We hold that the appeal was untimely and dismiss it. We

also deny the appellant's petition for a writ of mandamus.

1. The district court rendered its opinion on August 31, 1983, and on the same day entered its judgment in favor of the appellees. The appellees state that on September 6, 1983, their counsel received in the mail the district court's opinion, and upon checking the court docket sheets on September 8, 1983, confirmed that the judgment had been entered on August 31.

On November 25, 1983, the appellant, pro se, filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure "for an order vacating and reentering this Court's judgment, so as to facilitate the appeal on this action." In a supporting affidavit the appellant stated that he had not received the court's opinion or order, and that he first learned of them upon visiting the clerk's office on November 23, 1983. The affidavit further stated

that the appellant "has several times since the trial in this action made visits to the office of the Clerk to check on the subject docket" and "has also checked the actual docket sheets from time to time. At the last such checking, prior to November 23, 1983, Affiant saw no notification of an order or judgment on the said docket."

On January 3, 1984, the district court denied without opinion the motion to vacate and reenter. On January 9, 1984, the appellant filed a notice of appeal from both the August 31, 1983 order dismissing the case and the January 3, 1984 denial of the rule 60(b) motion.

2. Since, as the appellant concedes, the notice of appeal, filed more than four months after the August 31, 1983 order dismissing the case, was untimely, the only theory upon which the appellant might press his appeal would be if he could establish that the district court improperly denied

the rule 60(b) motion. The determination whether to grant such a motion is a matter largely within the discretion of the district court, CTS Corp. v. Piher International Corp., 727 F.2d 1550, 221 USPQ 11 (Fed. Cir. 1984); Hand v. United States, 441 F.2d 529 (5th Cir. 1971); Consolidated Masonry and Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249 (4th Cir. 1967), and appellate review is limited to determining whether the court abused its discretion. Hand, 441 F.2d at 531.

The district court did not abuse its discretion in denying the motion in this case. The fact that the appellant did not receive the opinion and order upon issuance did not excuse his failure to file a timely notice of appeal. Hensley v. Chesapeake and Ohio Railway Co., 651 F.2d 226 (4th Cir. 1981). Cf. Rule 77(d) of the Federal Rules of Civil Procedure: "Lack of notice of the entry by the clerk does not affect

the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. . . ." The appellant was required to examine the records of the district court to determine whether the case had been decided.

Although the appellant stated in his supporting affidavit that "several times since the trial" he had visited the clerk's office "to check on" the docket and that he "also checked the actual docket sheets from time to time," he did not allege that he had regularly checked with the clerk's office or examined the court records with sufficient frequency to ascertain when the court decided the case. For all that appears, he may not have checked with the court within 30 or 60 days after the court decided the case on August 31, 1983. Indeed, at oral argument, the appellant admitted that he might have been somewhat remiss in

checking the records around that time.

Moreover, since the appellees stated that within two days of receipt of the court's decision, their counsel, upon checking the docket, confirmed that the judgment had been entered, it would seem that if the appellant also had checked the docket sheet in September, he, too, would discovered that the case had been decided.

For these reasons, we cannot say that the district court abused its discretion in denying the rule 60(b) motion.

3. The appellant also has requested us to issue a writ of mandamus, apparently to compel the district court to grant his rule 60(b) motion. A writ of mandamus, however, is an extraordinary writ. It cannot be used as a substitute for appeal, Roche v. Evaporated Milk Association, 319 U.S. 21 (1942), and can be used to control matters committed to the discretion of the district court "only in the exceptional

case where there is clear abuse of discretion." Bankers Life and Casualty Co. v. Holland, 346 U.S. 378, 383(1953); In re Precision Screen Machines, Inc., 729 F.2d 1428, ___USPQ ____(Fed. Cir. 1984); Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., 717 F.2d 1374, 219 USPQ 577 (Fed. Cir. 1983). Since, as we have held, the appelant failed to note a timely appeal and the district court did not abuse its discretion by denying the rule 60(b) motion, there is no basis for issuing a writ of mandamus.

The appeal from the August 31, 1983 order is dismissed. The district court's January 3, 1984 denial of the rule 60(b) motion is affirmed. The petition for writ of mandamus is denied.

July 3, 1984
Date

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

In re Case, Petitioner) Appeal No. 84-753

PETITION FOR EXTRAORDINARY WRIT AND APPEAL

This Petition (and combined appeal) is submitted to this Honorable Court for the expressed and entire purpose of reversing the lower court's denial of Petitioner-Appellant's Motion to vacate and reenter the lower court's decision in CA 75-5033-T, D. Mass., and/or to enter Petitioner-Appellant's appeal on the merits of that decision onto the docket of this Honorable Court.

M E M O R A N D U M

STATEMENT OF THE FACTS

Civil Action No. 75-5033-T, D. Mass., was an action for patent infringement, and ancillary antitrust violations. The court below handed down a decision and judgment

in that action several months ago. The date of the decision is given on the docket sheets as August 31, 1983 (Exhibit M).

However, entries on the docket are not necessarily made on the date listed on the docket. As shown on the reverse side of Exhibit M, that was the last page of docket entries as of December 19, 1983, as certified by a deputy clerk. The last entries listed on the Exhibit M are dated December 5, 1983. When Petitioner requested certification, he remarked to the certifying clerk that the docket entries were incomplete. The said deputy clerk stated that he had no reason to doubt that such was the case, and proceeded to make the certification.

As shown in Exhibit N, a copy of the last page of the docket as made by Petitioner-Appellant on January 4, 1984, three entries predating December 19, 1983, by from 6 days to 12 days had been entered

onto the docket by that time.

In any event, Petitioner-Appellant received no notification from the clerk of the decision of the court below. On November 23, 1983, Petitioner-Appellant visited the clerk's office, inspected the docket, and found that the decision of the court below had purportedly been entered on August 31, 1983.

Petitioner-Appellant then filed on November 25, 1983, a Motion under Rule 60(b) (Exhibit B) and supporting Affidavit (Exhibit C). The grounds for that motion to vacate and reenter were in conformity with Rule 60(b)(1), F. R. Civ. P., stating that, and demonstrating, notice of the court's decision had not been received, and that Petitioner had established a pattern of checking on the docket as acknowledged by the docket clerk. An oral hearing was requested.

Petitioner-Appellant's motion was

opposed by the Respondent-Appellees on or about December 5, 1983. (Oppositions not exhibited).

Petitioner-Appellant had long been aware of facts strongly indicating that Respondent-Appellee's post-trial briefs had probably not been timely filed, that there was not docket entry for these briefs (Exhibit M), and that the only docket entry which could refer to these briefs ("Confidential information", Jan. 31, 1983) appeared to be predated. Accordingly, on December 7, 1983, Petitioner filed a motion for access to the record, seeking to inspect the filed copies (if any) of Respondent-Appellee's briefs (Exhibit D). Exhibit A attached to the original of this petition (sic) is Petitioner-Appellant's service copy of one of the said briefs. It is noted that the affidavit of service was not executed, and that the brief was not signed by local counsel in his own hand,

but was apparently signed by out-of-town counsel in local counsel's name. (Attached as Exhibit A to the copies of this petition are copies of only the first, next-to-last, and last pages of the said brief). There are no indications on the docket (Exhibit M) of any ratifications, explanations, or leave for belated entry of the "Confidential information", allegedly submitted on January 31, 1983.

Petitioner-Appellant then filed on December 13, 1983, a supplemental memorandum and affidavit in support of his Motion under Rule 60(b). (Exhibits E and F). These papers pointed out the apparently incorrect entry of January 31, 1983, onto the docket, and the irregularity in refusing access of a party to the record. These matters were no longer within the ambit of Rule 60(b)(1) (mistake or inadvertence), but now moved into the regime of Rule 60(b)(6) ("any other reason"--conventially

applied in matters of serious irregularity and/or gross abuse of discretion).

On or about December 19, 1983, Respondent-Appellees filed an opposition to Plaintiff's motion for access to the record, together with an affidavit, and further argument against the granting of the Motion under Rule 60(b) (attached as Exhibit G). These pleadings continued to request that access to the record be denied. In place of reference to the record, wherein the time and date stamp might demonstrate when the post-trial briefs were filed, these pleadings relied on an affidavit purporting to state when the said pleadings were presented to the court.

On December 22, 1983, Petitioner-Appellant filed a response, showing that the Affidavit of December 19 was inconsistent with the documents attached thereto, and with known facts (Exhibit H).

On January 3, 1984, the court below

entered orders allowing access to the record (Exhibit I) and denying, without hearing or explanation, the motion under Rule 60(b) (Exhibit J).

On January 4, 1984, and January 5, 1984, as already demonstrated before this Honorable Court, Petitioner-Appellant attempted to gain access to the record, as allowed by the court below (Exhibit L). That access was again denied, as has been demonstrated.

On January 5, 1984, the clerk of the court below issued a notice contemplating destruction of the trial exhibits (Exhibit K).

The Petitioner-Appellant filed notice of appeal and petition on January 9,1984, with the Appeals Clerk, D. Mass.

Petitioner-Appellant visited the office of the appeals clerk, D. Mass., on January 19, 1984, and found in the record on file an envelope marked as No. 493,(Copy attached

as Exhibit P). In the envelope the Petitioner found just one brief, copies of the first, next-to-last, and the last pages attached hereto as Exhibit Q. Petitioner failed to find a copy of the post-trial brief, attached hereto as Exhibit A. (Copies of the first, next-to-last, and last pages are attached as Exhibit A to the copies of this petition).

On January 21, Petitioner received a response from Respondent-Appellee National Gypsum, indicating that counsel had already seen some of the papers not yet received by Petitioner.

On January 24, petitioner received service copies of motions from Respondent BASF wyandotte, dated January 19, 1984.

THIS COURT HAS JURISDICTION OF THIS PETITION-APPEAL

1. This court has specific and exclusive statutory jurisdiction of the appeal on the merits of the decision in CA 75-5033-T,

which was basically an action for patent infringement.

2. There is precedent for entertaining a timely appeal of denial of a motion under Rule 60(b), and for reversing that denial on grounds of abuse of discretion. Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute (CADC, 1974) 500 F.2d 808.

3. This Honorable Court has jurisdiction under the all writs statute (28 USC 1651) to entertain an extraordinary writ in aid of its respective jurisdiction (exclusive jurisdiction over patent appeals).

> "a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal"
> Mr. Chief Justice Stone, in Roche v. Evaporated Milk Ass'n. 319 U.S. 21, 26 (1942)

> "Since the Court of Appeals could at some stage of the . . . proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them."
> La Buy v. Howes Leather Co. 352 U.S. 249, 255 (1956)

"it (is) the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."
McClellan v. Carland, 217 U.S. 268, 280 (1909)

"in Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943), Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'"
FTC v. Dean Foods Co. 384 U.S. 597, 603 (1965)

Both the CCPA and the Court of Claims have found that they had jurisdiction under the All Writs Statute, and both have issued extraordinary writs thereunder:

Duffy v. Tegtmeyer (CCPA,1974) 489 F.2d 745, 747

Cook v. Dann (CCPA,1975) 522 F.2d 1276

Reddy v. Dann (CCPA,1976) 529 F.2d 1347, 1348

Import Motors Ltd. v. U.S. Inter. Trade Comm. (CCPA,1975) 530 F.2d 937,940, (Extraordinary writ issued)

U.S. v. Boe (CCPA,1976) 543 F.2d 151, 161 (Extraordinary Writ issued)

Gulf +. S. Am. Steamship Co. v. U.S. (Ct. Claims, 1974) 500 F.2d 549, 555-556 (Writ issued)

The Supreme Court has found that there need not be a perfected appeal, but that the All Writs Statute applies to an appeal which might be perfected (Roche v. Evaporated Milk Assn., supra, and FTC v. Dean Foods Co., supra). Thus, the All Writs Statute clearly applies where the only purpose is to reach the appeal on the merits, which might otherwise be defeated without reaching the merits. (McClellan v. Carland, supra)

> "Among (the various conditions for the issuance of an extraordinary writ) are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires" Roche v. Evaporated Milk Assn.,supra at 26, Kerr v. U.S. Dist. Ct., 426 U.S. 394, 403 (1975)

THE MOTION UNDER RULE 60(b) WAS FULLY MERITIOUS. AND IT WAS AN ABUSE OF DISCRETION TO DENY THAT MOTION

It was not contested that Petitioner-Appellant failed to receive notice of the decision of the court below. And it was acknowledged by the clerk of the court below that Petitioner-Appellant had established a pattern of checking on the docket. Further, it has been demonstrated that docket entries (such as of the decision and judgement) are not necessarily made on the date listed.

Thus, there is manifestly more than mere failure to give notice of the court's decision. The pattern of checking on the docket is in conformity of the decisions cited in the Motion under Rule 60(b) (Exhibit B). Rule 77(d) was clearly transcended.

> "where the movant has shown a meritorious defense, the itemized grounds for relief under the Rule (60(b)) ' are to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments . . . Any doubts about whether relief should be granted should be resolved in favor of setting aside the default . . . Tolson v. Hodge (4th Cir. 1969), 411 F.2d 123, 130; Brennan v. Midwestern United

Life Insurance Co. (7th cir., 1971), 450 F.2d 999, 1003, cert. denied, 405 U.S. 921, . . . State of Iowa v. Union Asphalt and Roadoils, Inc. (S.D. Iowa 1968), 281 F.Supp. 391, 398, aff'd 8th Cir. 408 F.2d 1171. In short, any considerations of the need 'to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments . . . should never be used to thwart the objectives of the blind goddess' of justice itself. Boughner v. Secretary of Health, Ed. and Welfare, U.S., 572 F.2d at 978-79"

Compton v. Alton Steamship Co. (CA 4, 1979) 608 F.2d 96, 102-3 (relying on Moore's Fed.Practice Par. 60.27(1) at pp. 346-47)

It was clear abuse of discretion to deny the motion under Rule 60(b). (Expeditions Unlimited, Supra).

The 10th Circuit, in Fleming v. Gulf Oil Corp., 547 F.2d 908, 913-914, reversed the district court in similar circumstances.

"the appellant was not given a fair opportunity to be heard . . . That case was disposed of without notice or legal authority."

THE DEMONSTRATED MISHANDLING OF THE DOCKET INVOKES RULE 60(b)(6)

There was systematic abuse of procedure by the clerks of the court below, which acted to aid the cause of Appellee-Respondents. (Clearly,it is not necessary to establish evidence of specific collusion or out-and-out corruption):

1. There was an apparent incorrect entry of the date of submission of post-trial briefs.

2. The post-trial briefs bore informal signatures and affidavits of service. No ratifications were filed.

3. Inspection of the record was denied, even after the granting of a court order.

4. Inconsistent entries were made on the docket (Exhibits M and N).

5. An inconsistent affidavit of December 19 was entered, and apparently relied upon, rather than refer to the record.

6. The clerk contemplates the destruction of the record, in view of an impending appeal.

All of the above bear with immediate relevancy on Petitioner's failure to receive notice of the decision of the court below. It was a gross, blatant abuse of discretion for the court below to deny the motion under Rule 60(b), when the immediate result would be to cover-up for the misdeeds of the court's clerks.

Gross abuse of discretion mandates reversal of the denial of the motion under Rule 60(b):

> "Fair hearings are in accord with the elemental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the court to set aside the . . . . judgment and grant petitioner a fair hearing" Klapprott v. U.S. 335 U.S. 601, 615 (1948)

> "(the)'All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion'". La Buy v. Howes Leather Co., supra at 257, citing Bankers Life and Casualty Co. v. Holland, 34 U.S. 379,383(1953)

"Considerations of importance . . . are that the trial court, . . . acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling" Roche v. Evaporated Milk Assoc., supra at 26

Extraordinary writs are to be used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" Roche v. Evaporated Milk Assn., supra at 26
Platt v. Minnesota Mining Co. 376 U. S. 240, 245 (1963)

The action of the lower court in denying an opportunity for appeal surely "has thwarted or tends to thwart appellate review", Roche, supra. The lower court's action takes on even greater significance when it is noted that its clerks were present at the quaint ex parte conferences held by the lower court with the parties, during the trial in the action below. Further, just what originally was in the "Confidential Information", Docket No. 493? What connection, if any, exists

between the ex parte conference, the apparent failure to send notice of the decision, the adamant refusal to allow inspection of the record? Is there any connection with the decision itself? What happened to the second post-trial brief in the record? Was anything other than the second brief removed from the "Confidential information", Docket No. 493? Was there any extraneous information in the filing which ties all these matters together in some fashion which demands secrecy?

Turning to Exhibit P, note the hand-written dates, in place of the usual date- and time stamp. Why did this happen? Was the date stamp unavailable, such as by being located at some other place other than where the handwritten notation was made? Where? Would the date stamp have shown other information, than shown in the handwritten notation, such as some

other date? Why did the clerks so strenuously resist the inspection of this document? Doesn't all this have the obvious color of irregularity?

It should also be noted in Exhibit P, and Exhibit A, (assuming that Exhibit A will at some time become part of the record) that these briefs purport to bear the signature of then local counsel. But that signature was initialled as being affixed by out-of-town counsel. Also note that the affidavits of service were not executed. Clearly, local counsel must not have had an opportunity to read these briefs, or to sign them in his own name. There are manifest violations, about 4 in all, of Rule 11, F. R. Civ. P. Were these violations a consideration in refusing to allow inspection?

It should be further noted that the clerk has apparently affixed small tags of paper, bearing the notation of No.

493, to the envelope and remaining contents, Exhibits P and Q. Is this a usual procedure? It seems to be the only such circumstance in the instant record. Isn't this indicative of "special" attention to the particular filing? When were those tags affixed? Why?

The most immediate issue is Rule 60(b)(1). Can it possibly be disputed that the clerk's involvement far surpassed mere failure to give notice of the decision, and thus that the said motion, Exhibit B, must be granted? Isn't blatant abuse of discretion in denying that motion established beyond controversy?

Also in issue is Rule 60(b)(6). Isn't it manifest that the court below, and its clerks, engaged in such behaviour as to require invocation of that Rule, so that this Honorable Court may review the proceedings below, and restore some semblance of order and conformity with acceptable procedure?

THIS COURT HAS INHERENT JURISDICTION ON THE FACTS

It is recognized that courts, particularly courts of appeal, have inherent jurisdiction over matters brought to their attention which involve "fraud on the court", or where there "might have been" a "fraud on the court". Wright and Miller, Fed. Practice and Procedure, Civil, 11, Chap. 8, Par. 2870. The leading authority is, of course, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), wherein a case was reopened and a judgment vacated, long after the decision, because of fraudulent conduct on the part of the prevailing party. More specific grounds for this jurisdiction are "corruption of the judicial process", Wright and Miller, supra at 255, Lockwood v. Bowles (D.D.C., 1969) 46 FRD 625, 632, "Improper influence on the court" Wright and Miller, supra at 255, Root Ref. Co. v. Universal Oil Prods.

Co. (CA 3, 1948) 169 F.2d 514, 535-41, cert. den. 335 U.S. 412, and "bribery of a judge" Wright and Miller, supra, Root Ref. Co., supra, Chicago Title and Trust Co. v. Fox Theatres Corp. (D.N.Y., 1960) 182 F. Supp. 18.

Petitioner does not assert that there has been "bribery of a judge" or necessarily that there has been "improper influence on the court." Whether there has been "corruption of the judicial process" is a matter left to a determination by this Honorable Court. But it is absolutely manifest that the handling of the subject action in the court below, culminating in a failure to give notice of the decision, denial of the motion under Rule 60(b) and for access to the official record, and a threat to destroy to record needed for appeal, represents a grave departure from accepted norms of judicial action. That departure clearly

discredits any perception of judicial integrity. Is it corrupt? Let this court decide.

Petitioner submits that the doings in the court below, whether or not "corrupt", or caused by "improper influence", are manifestly so far removed from acceptable procedure as to confer jurisdiction on this Honorable Court, under the line of authority just relied upon. Perhaps this Honorable Court might choose to enlarge upon Wright and Miller, and establish an overall category wherein a demonstrated threat to the public perception of judicial integrity invokes inherent jurisdiction. That would seem to be perhaps the mildest fashion in which to phrase the issue.

THE DENIAL OF THE MOTION UNDER RULE 60(b) WOULD THWART AN APPEAL ON THE MERITS, OF MANY STRANGE DOINGS IN THE COURT BELOW. RULE 60(b)(6) MUST APPLY

The Statement of Issues presented for Review, already filed with this Honorable Court, sets forth many matters, most of which are unbelievable, inordinate, or both. Petitioner-Appellant often thought during the course of the proceedings that the proceeding obviously could not stand an appeal on the merits from his side of the action, and wondered how the court below could justify its actions, in case of appeal. Now, everything may be clear--was it always intended that there be no appeal on the merits?

In any event, the action of the court below in denying the motion under Rule 60(b) has the undeniable effect of preventing an appeal on the merits of a decision which cannot be justified, condoned, or

allowed to stand. The decision must be reviewed on the merits. The actions of the court below amount to the "usurpation of power", denying this Honorable Court of its statutory jurisdiction, which is the ultimate and mandatory grounds for exercise of the All Writs Statute:

Roche v. Evaporated Milk Assn., supra at 26

Will v. U.S., 389 U.S. 90, 95(1967)

Kerr v. U.S. Dist. Ct., supra, at 402

La Buy v. Howes Leather Co., supra, at 257

To consider just one issue presented for review, a copy of the allegedly privileged document listing is appended hereto as Exhibit O. Here are seven documents referring to the patents in suit. None were ever submitted to the court below for an in camera review. All have been summarily withheld. On the face of this listing, most cannot be privileged. (Note that most are not between a lawyer

and a putative client. Note the numerous recipients of copies. Note that one was even sent to the file room --TIC).

It is well settled indeed that such documents are to be inspected in camera before deciding on a claim of alleged privilege. Kerr v. U.S. Dist. Ct., supra at 404-405, clearly holds that such an in camera inspection is to take place. There is but one manner in which that inspection may not take place here, and the next step is that this Honorable Court assert jurisdiction over the appeal on the merits.

Let us proceed with that appeal on the merits, and determine how this Honorable Court may act within its Congressional charter to see that patent actions proceed in accordance with the rules, precedents, and precepts of conduct, and that such actions are to be decided on the merits.

Respectfully submitted,

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January ,1984

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 8

1. The Congress shall have power: . . .

8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

35 USC 154 (CONTENTS AND TERM OF PATENT)

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of issue fees as provided for in this title, of the right to exclude others from making,using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

35 USC 281 (REMEDIES FOR PATENT INFRINGEMENT)

A patentee shall have remedy by civil action for infringement of his patent.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

. . . .

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

. . . .

or(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment was entered or taken.

. . . . . .

Rule 77(d) Notice of Orders or Judgments.

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.